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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. 97-42

EASTERN ENTERPRISES,
Petitioner,
v.
KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICUS CURIAE THE PITTSTON COMPANY IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Pittston Company ("Pittston") is a Virginia corporation headquartered in Richmond.[1] The company's predecessors and subsidiaries have been mining coal in the eastern United States since 1838.

The Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act" or "Act"), 26 U.S.C. §§ 9701-9722, establishes the United Mine Workers of America Combined Benefit Fund ("Combined Fund") and obligates certain

[1] Pursuant to Sup. Ct. R. 37.6, Pittston advises the Court that this brief was not authored in whole or in part by counsel for any party and that no person other than Pittston has made a monetary contribution to the preparation or submission of this brief.

companies ("assigned operators") to contribute to it. To date, Pittston and its subsidiaries have been "assigned" over 5,000 beneficiaries and have paid almost $50,000,000 in "premiums" under the Act. The future liabiliites of Pittston and its subsidiaries under the Coal Act are projected to be in excess of $200,000,000.

Pittston submits this brief on the issue of severability. If some of the funding provisions of the Coal Act are unconstitutional, do the remainder stand? Pittston is materially interested in this question because the loss of one funding source will impose additional liability on one or more of the remaining funding sources, and possibly on Pittston subsidiaries.

This brief is being filed by consent of the parties. Letters of consent have been lodged with the Clerk.

SUMMARY OF ARGUMENT

The provisions of the Coal Act relating to funding of the Combined Fund are "inextricably bound together" and "must stand or fall as a unit." *Planned Parenthood v. Danforth*, 428 U.S. 52, 83 (1976). If one source of revenue is eliminated, the remaining sources will have to pay more. The Court cannot invalidate part of the law without materially affecting what remains.

There is "strong evidence" that Congress intended to require contributions from *all* former employers—or to require contributions from none of them. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). The legislative record shows Congress would not have established the Combined Fund without including pre-1978 signatories like Eastern Enterprises. The inclusion of these so-called "super-reachback" companies was critical to passage of the Coal Act, and there would have been no Combined Fund without them. Indeed, adding the super-reachbacks was "the essence" of the bipartisan compromise that led to passage of the Act. 138 Cong. Rec. S17603-04 (daily ed. Oct. 8, 1992) (Conf. Rep.). These facts easily overcome any presumption of severability arising under 26 U.S.C. § 7852(a).

If the Court invalidates some of the provisions of the Coal Act relating to the Combined Fund, it must invalidate all of them. Otherwise, the Court will be simply rewriting the statute and reordering the benefits and burdens of the law.

ARGUMENT

I. THE COAL ACT IS UNIQUE

The Coal Act is unique, and the controversies that it has generated both in Congress and in the courts should come as no surprise.

While entitled the "Coal Industry Retiree Health Benefit Act," the Act actually provides benefits to only one segment of coal industry retirees—those represented by the United Mine Workers of America ("UMWA"). The law provides no benefits to nonunion or non-UMWA retirees with similar work histories.

Although the Act is often described as providing basic health care for UMWA beneficiaries, most of the beneficiaries are already covered by Medicare. Congressional Research Service, *Coal Industry: Use of Abandoned Mine Reclamation Fund Monies for UMWA "Orphan Retirees" Health Benefits, reprinted in* 138 Cong. Rec. S17607 (daily ed. Oct. 8, 1992). For them, the Act essentially functions as a "Medigap" policy, providing prescription drug and other benefits not available to other Medicare recipients. *Id.*

While Congress sought to identify and impose liability on the "persons most responsible for [UMWA] plan liabilities," the Coal Act requires companies to provide lifetime health care to employees who worked for them as little as one shift, and as far back as 45 years ago. Coal Act, Pub. L. No. 102-486, Tit. XIX, Subtit. C, § 19142, 106 Stat. 3037 (1992) (Findings and Declaration of

Policy); *see* 26 U.S.C. § 9706. In so doing, the Act displaced collective bargaining agreements that previously determined contributions to the UMWA Funds. 26 U.S.C. § 9708.

In Congress, the Coal Act was "one of the most contentious pieces of legislation" its sponsors had ever seen. 138 Cong. Rec. S10783 (daily ed. July 29, 1992) (statement of Sen. Rockefeller). In the courts, the Act has proven no less contentious or controversial. *See Blue Diamond Coal Co. v. Secretary of HHS*, 79 F.3d 516 (6th Cir.), *cert. denied*, 117 S. Ct. 682 (1997); *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996); *Lindsey Coal Mining Co. Liquidating Trust v. Shalala*, 90 F.3d 688 (3d Cir. 1996); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124 (4th Cir. 1996); *In re Chateaugay*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995); *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832 (6th Cir.), *cert. denied*, 116 S. Ct. 64 (1995).

II. THE STANDARD FOR SEVERABILITY

The standard for determining severability has remained constant for many years.

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if that which is left is fully operative as a law.

Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932). To be fully operative as a law, what is left must be "functionally independent" of what is removed. *United States v. Jackson*, 390 U.S. 570, 586 (1968). A partially invalidated law must also function in a manner consistent with the intent of Congress. *Alaska Airlines*, 480 U.S. at 685. If it is evident that Congress "would not have passed" the law "had it known the challenged

provision was invalid," the law is not severable. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985).

A severability clause[2] gives rise to a presumption that the law is severable. *Alaska Airlines*, 480 U.S. at 686. But the Court's overall objective remains to determine Congress's intent. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936). Even with a severability clause, a law will not be severed when there is "strong evidence that Congress intended otherwise." *Alaska Airlines*, 480 U.S. at 686; *INS v. Chadha*, 462 U.S. 919, 1014 (1983) (Rehnquist, J., dissenting). As a result, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *Jackson*, 390 U.S. at 586 n.27.

III. THE STRUCTURE OF THE COMBINED FUND

The Combined Fund provides benefits to UMWA retirees and their dependents who were eligible for and receiving benefits from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of July 20, 1992. 26 U.S.C. § 9703(f). At present, there are approximately 75,000 people in this group.

The Combined Fund is financed primarily from "premiums" paid by "assigned operators." *Id.* The Act also provides for transfers to the Combined Fund of certain amounts from the 1950 UMWA Pension Plan, which was overfunded, as well as interest from the Abandoned Mine Reclamation Fund, also known as the Abandoned Mine Land Fund ("AML Fund"). *Id.* § 9705; 30 U.S.C. § 1232(h).

The purpose of the Act is to assign as many beneficiaries as possible to former signatory employers. Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037 (Act

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[2] While the Coal Act contains no severability clause, the Act was included in the Internal Revenue Code, which does have a general severability clause as discussed *infra* pp. 12-13.

intended "to identify the persons most responsible for plan liabilities"); 138 Cong. Rec. S17604 (daily ed. Oct. 8, 1992) (Conf. Rep.) ("overriding purpose is to find and designate a specific obligor for as many beneficiaries in the Plans as possible").

Congress carefully crafted the order in which assignments must be made. 26 U.S.C. § 9706(a). A retiree is first assigned to the signatory operator which was a 1978 or later signatory and was the most recent signatory operator to employ the retiree for at least two years. *Id.* § 9706(a)(1). If there is no such operator, the retiree is assigned to the signatory operator which was a 1978 or later signatory and was the most recent signatory operator to employ the retiree—regardless of length of service. *Id.* § 9706(a)(2). Finally, if a retiree cannot be assigned under either of these criteria, the retiree is assigned to the signatory operator which employed the retiree for the longest period of time before 1978. *Id.* § 9706(a)(3). Any retiree who cannot be assigned under any of these criteria is an "unassigned beneficiary." *Id.* § 9704(d).

Assigned operators must pay an annual premium for each beneficiary assigned to them. *Id.* § 9704(b). For 1997, the premium is $2,343.31 per beneficiary. Assigned operators are also liable for an "unassigned beneficiaries premium" if the transfers from the AML Fund are insufficient to pay for the health care of the unassigned beneficiaries. *Id.* §§ 9704(d), 9705(b).

To date, the annual transfers from the AML Fund (and the earlier, non-recurring transfers from the 1950 UMWA Pension Plan) have been sufficient to pay for the health care costs of the unassigned beneficiaries, but there are limits on the amount of AML money which may be transferred to the Combined Fund. 30 U.S.C. § 1232(h). If the limits are reached, an unassigned beneficiaries premium will be assessed against the assigned operators. 26 U.S.C. § 9704(d). Each assigned operator must then pay

its pro rata share of the cost of providing health care to the unassigned beneficiaries.

If the Coal Act is declared unconstitutional as to Eastern Enterprises and other pre-1978 signatories, a significant source of funding for the Combined Fund will be eliminated. Two possible results are:

> (1) These beneficiaries become "unassigned" (notwithstanding the fact that the statute provides for their assignment) and are placed in the unassigned beneficiary pool. This would result in a much larger diversion of money from the AML program.[8] 26 U.S.C. § 9705(b); 30 U.S.C. § 1232(h). Should available AML money not cover the costs of providing health care to the unassigned beneficiaries, the remaining operators would have to pay an unassigned beneficiary premium. 26 U.S.C. § 9704(d).
>
> (2) The beneficiaries are reassigned to remaining signatory operators, contrary to the order of assignments in the existing statute. Under this scenario, retirees now assigned to Eastern and similarly situated companies would be reassigned to other signatory operators who employed the retirees, if only for a day. This would, of course, increase the premiums paid by the remaining operators.

This much is clear: The Court cannot eliminate one funding source without increasing the burden on other sources. This is not a case where the Court can strike one portion of the statute and leave the rest unaffected.

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[8] The AML program is part of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328. As its name implies, the program is designed to provide for the "reclamation and restoration of land and water resources adversely affected by past coal mining." *Id.* § 1231(c)(1). The program is primarily funded by per ton fees that companies pay on their coal production. *Id.* §§ 1231(b)(1), 1232(a). For a discussion of how the Coal Act uses AML fees, see the report by the Congressional Research Service, *Coal Industry: Use of Abandoned Mine Reclamation Fund Monies for UMWA "Orphan Retirees" Health Benefits, reprinted in* 138 Cong. Rec. S17607 (daily ed. Oct. 8, 1992).

This conclusion becomes all the more clear when one considers cases in which the Court *has* found an invalid provision to be severable. *Alaska Airlines*, 480 U.S. 678, is illustrative. In that case the Court found an invalid provision for a legislative veto to be severable from the Employee Protection Program to which it had been attached. The Court distinguished between the substantive provisions of the Act—the arrangement for assisting airline employees dislocated as a result of deregulation of commercial air carriers—and the legislative-veto provision. Such a provision "by its very nature is separate from the operation of the substantive provisions of a statute." 480 U.S. at 684-85.

Similarly illustrative is *Jackson*, 390 U.S. 570. The Court found the death penalty clause of the Federal Kidnapping Act to be unconstitutional but held that it was severable from the remainder of the statute. The Court's decision turned upon its finding that the death penalty clause "is a functionally independent part of the Federal Kidnapping Act. Its elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation." 390 U.S. at 586.

Both *Alaska Airlines* and *Jackson* point out the difference between substantive portions of a statute and provisions, such as the legislative veto in *Alaska Airlines* or the death penalty clause in *Jackson*, whose invalidation leaves Congress's substantive arrangement in place. In the present case, the provision challenged by Eastern is an intrinsic part of the Coal Act's substantive operation. Eliminating the challenged provision of the Act *would* alter the statute's substantive reach and *would* change its basic operation. The provisions of the Coal Act relating to the Combined Fund are "mutually dependent upon one another," *Carter*, 298 U.S. at 313, and "inextricably bound together," *Danforth*, 428 U.S. at 83, and therefore may not be severed.

The intricate, fully integrated funding scheme of the Coal Act cannot function as designed by Congress if one

of the funding sources is eliminated. Any attempt to sever the funding mechanism as it applies to super-reachbacks, but to leave it otherwise intact, would result in a fundamentally different Coal Act—a result not of the legislative process, but of the Court's decree. If the Court declares part of the financing system for the Combined Fund unconstitutional, it should invalidate all aspects of the financing scheme and leave it to Congress to undertake any redesign of the Coal Act it thinks appropriate. The Court should not readjust the benefits or burdens of the law in the name of severability.

IV. LEGISLATIVE INTENT

A statute is not severable if Congress would not have passed the statute "had it known the challenged provision was invalid." *Brockett*, 472 U.S. at 506. In this case, there is compelling evidence that Congress would not have established the Combined Fund without the participation of the super-reachbacks like Eastern Enterprises.

In the years before the Coal Act, the 1950 and 1974 UMWA Health Funds began to run large deficits. *See Coal Commisssion Report: A Report to the Secretary of Labor and the American People* (November 1990). The Bituminous Coal Operators' Association ("BCOA") and UMWA blamed these deficits on employers who left BCOA and ceased contributing to the Funds. *See Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate Comm. on Finance*, 102d Cong. 39, 43, 278, 296 (1991) ("Coal Commission Hearing"). Others blamed the deficits on the failure of BCOA and UMWA to set an appropriate contribution rate and on BCOA's subsequent refusal to honor the "guarantee clause," which required BCOA to increase contributions as necessary to maintain health benefits. *See id.* at 25, 30-31, 212; *McGlothlin v. Connors*, 142 F.R.D. 626, 644-45 (W.D. Va. 1992).

The primary proponents of a legislative solution to this health care "crisis" were BCOA and UMWA, whose wage agreement was scheduled to expire in 1993. 137 Cong. Rec. S17061 (daily ed. Nov. 19, 1991) (statement of Sen. Rockefeller). It was expected that financing for the 1950 and 1974 Health Funds would be a major, perhaps insurmountable, issue in the negotiations for a new contract. 138 Cong. Rec. S17607 (daily ed. Oct. 8, 1992) (Conf. Rep.). BCOA and UMWA therefore formed a coalition to promote legislation that would shift a part of retiree health care costs to others. Staff of House Comm. on Ways and Means, 103d Cong., *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits* 50-51 (Comm. Print. 1993).

Much of the legislative debate centered on how to fund the health care of "orphans," retirees whose employers no longer contributed to the UMWA Funds. The orphans' former employers were accused of "dumping" their "liabilities" on BCOA. Coal Commission Hearing at 41, 44. Companies like the Pittston subsidiaries, which left BCOA and negotiated their own agreement with UMWA on contributions to the Funds, were also criticized for having signed "nonconforming" agreements.[4]

[4] A "nonconforming" agreement was one with contribution rates that differed from the rates in the National Bituminous Coal Wage Agreement negotiated between BCOA and UMWA. In *UMWA 1974 Pension v. Pittston Co.*, 984 F.2d 469 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993), the court held that an "evergreen clause," incorporated into the NBCWAs from trust agreements, required Pittston subsidiaries to contribute at the NBCWA rates even though they were no longer members of BCOA. Thus construed, the "evergreen clause" gave UMWA and BCOA the power to set contribution obligations for the rest of the unionized coal industry, including Pittston subsidiaries and other independent producers.

Even the most expansive reading of the so-called evergreen clause, however, cannot impose an obligation upon a coal company, such as Eastern, which was never signatory to a 1978 or later NBCWA, inasmuch as this provision, which underlies the decision in *Pittston*, was not part of any NBCWA prior to 1978. Moreover, there is no suggestion in *Pittston* that an obligation to contribute to the UMWA Funds can extend beyond the time a signatory employer ceased to have employees covered by a labor contract with the UMWA, since the only measures of such obligations were (i) hours of employment or (ii) tons of coal produced by employees covered by such a contract.

There were many different legislative proposals for resolving the "crisis" at the UMWA Funds. These proposals included bills imposing an industry-wide tax and limited reachback liability, such as S. 1989, 102d Cong. (1991), as well as countermeasures imposing funding liability only on current signatories, such as S. 2550 102d Cong. (1992). Until the crafting of the Coal Act, however, no proposal was satisfactory to both Congress and the President.

The Coal Act was a "bipartisan compromise"; its key feature was the imposition of liability on all former signatories to NBCWAs. 138 Cong. Rec. S17612 (daily ed. Oct. 8, 1992) (Conf. Rep.) As Senator Rockefeller explained, expanded reachback liability took the place of an earlier proposal for an industry-wide tax, which had been vetoed by the President.

> The funding mechanism in [the Coal Act] is the one proposed by the administration and on which the administration insisted . . . .
>
> Instead of including a broad industrywide tax, the basic funding mechanism of this legislation generally requires premium payments from those for whom the retirees worked. These are the responsible companies.

138 Cong. Rec. S17633 (daily ed. Oct. 8, 1992). The Conference Report on the Coal Act stated that expanded reachback liability was "the essence" of the agreement for the bill. 138 Cong. Rec. S17603 (daily ed. Oct. 8, 1992); *see also* 138 Cong. Rec. S10783 (daily ed. July 29, 1992) (statement of Sen. Rockefeller). The Act's

"overriding purpose [was] to find and designate a specific obligor for as many beneficiaries in the Plans as possible." 138 Cong. Rec. S17604.

Based on this history, there is no doubt that the super-reachback provisions of the Coal Act were essential to its passage. If the Court were to strike those provisions and leave the remainder of the Act intact, it would be creating a statute that otherwise would not have become law.

Although the Coal Act is part of the Internal Revenue Code and the premiums that assigned operators must pay are taxes,[5] *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1251 (1997); *In re Chateaugay Corp.*, 53 F.3d at 498, any presumption of severability from 26 U.S.C. § 7852(a) is weak at best.[6] It makes sense, of course, to apply the principle of severability to the Internal Revenue Code writ large—a huge array of provisions touching every aspect of the revenue system. The Code has come into being and has evolved over a long period of years, the result of many enactments. There is, accordingly, good reason to apply the principle of severability to the Code

[5] While the contributions which assigned operators must pay constitute federal revenues, Congressional Research Service, *Budget Treatment of the UMWA Retiree Health Benefit Program*, 93-979-E, pp. 1, 5-6 (1993), these contributions are collected, managed, and spent by the UMWA Combined Benefit Fund, a privately appointed entity over which the government exercises no control. For this reason, in a case now pending in United States District Court for the Eastern District of Virginia, Pittston argues that the Coal Act violates the nondelegation and separation of powers doctrines. *Pittston Co. v. United States*, No. 3:97 CV 294 (E.D. Va. filed April 24, 1997).

[6] 26 U.S.C. § 7852(a), which was part of the Internal Revenue Code when the Coal Act was passed, provides:

> If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby.

as such. By contrast, however, the Coal Act came into being at a later, single point in time. Unlike the Internal Revenue Code, the Coal Act represents an effort by Congress to achieve a comprehensive settlement of a specific problem.

The Coal Act itself contains no severability clause, and there is no direct indication that Congress intended the funding sources in the Coal Act to be severable. All the evidence is, in fact, to the contrary. Severability should not turn on a presumption which is contradicted by both the structure of the statute and its legislative history. *Jackson*, 390 U.S. at 585 n.27; *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991).

V. SEVERABILITY SHOULD BE DECIDED NOW

It is the policy of the Court to decide constitutional issues only as necessary to dispose of a case. *Brockett*, 472 U.S. at 501. This policy must be distinguished, however, from the Court's duty to declare whether a partially invalidated statute is severable. *Alaska Airlines*, 480 U.S. at 684. When the Court decides severability, it is not ruling on the constitutionality of what remains, but on whether anything remains. This is primarily an issue of legislative intent. If Congress would not have enacted the statute without its objectionable features, the Court must declare it nonseverable.

In *Printz v. United States*, 117 S. Ct. 2365 (1997), the Court declined to decide the severability of the Brady Act because none of the parties to the case was affected by its remaining provisions. In that case, however, the invalidated provision, which obligated local officials to carry out federal law, had no effect on the remaining provisions of the Act, which imposed reporting requirements on gun dealers. In the present case, by contrast, a partially invalidated statute will result in added burdens on the remaining funding sources, and the Court should

not postpone its severability decision. As the Court recognized in *United States v. Raines*, 362 U.S. 17, 23 (1960), declaring a statute nonseverable does not violate prudential concerns when Congress intended nothing less than the entire law.

CONCLUSION

The provisions of the Coal Act relating to the Combined Fund are not severable, and the Court should so declare.

Respectfully submitted,

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